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# In The Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT
and DAVID W. GORDON, Superintendent,

*Petitioners,*

v.

MICHAEL A. NEWDOW,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND THE THOMAS MORE LAW CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND URGING REVERSAL

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TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE | 1 |
| SUMMARY OF THE ARGUMENT | 2 |
| ARGUMENT | 3 |
| A. The Attack on the Public Acknowledgement of Our Nation's Religious Heritage | 3 |
| B. Our Historic Religious Heritage of God-Given Freedom | 5 |
| C. The Irrationality of Eradicating the Public Acknowledgement of God and Religion | 7 |
| D. The Danger of Divorcing All Public Reference to God and Religion | 10 |
| E. The Pledge of Allegiance Does Not Coerce Religious Belief or Practice | 15 |
| CONCLUSION | 17 |

## TABLE OF AUTHORITIES

Page

CASES

*Engel v. Vitale*, 370 U.S. 421 (1962) ..... 10

*Lee v. Weisman*, 505 U.S. 577 (1992) ..... 4, 15

*Lynch v. Donnelly*, 465 U.S. 668 (1984) ..... 4, 7, 8, 9, 10

*Marsh v. Chambers*, 463 U.S. 783 (1983) ..... 8

*Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) ..... 3

*Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003) ..... *passim*

*Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) ..... 7, 8, 15

*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ..... 15, 16

*Zorach v. Clauson*, 343 U.S. 306 (1952) ..... 11

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I ..... 3, 9, 10

4 U.S.C. § 4 ..... 10

RULES

Sup. Ct. R. 29.6 ..... 1

Sup. Ct. R. 37.3(a) ..... 1

Sup. Ct. R. 37.6 ..... 1



## TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

Charles F. Adams, ed., *The Works of John Adams, The Second President of the United States* (1854) ..... 8

Alex de Toqueville, *Democracy in America* (1955) ..... 11

*How the Words "Under God" Came to be Added to the Pledge of Allegiance to the Flag*, at http://www.kofc6793.org/underGod.html ..... 6

Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII (1781) ..... 14

David Limbaugh, *Persecution: How Liberals Are Waging War Against Christianity* (2003) ..... 5

Abraham Lincoln, *Gettysburg Address*, at http://www.thecapitol.net/Recommended/Lincoln.htm ..... 14

John Locke, *Two Treatises of Government* (1690) ..... 5

Jessica Lynch, *Being an American*, Parade, November 9, 2003 ..... 13

John Parker, *A Nation Apart: A Survey of America*, The Economist, Nov. 8-14, 2003 ..... 6, 11

Robert Rutland, ed., *The Papers of James Madison* (1973) ..... 8

Jared Sparks, ed., *The Writings of George Washington* (1837) ..... 8

The Declaration of Independence (U.S. 1776) ..... 5

## STATEMENT OF IDENTITY AND INTEREST OF THE AMICI CURIAE[1]

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. Headquartered in New York City, the Catholic League defends the right of Catholics to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard the religious freedom rights and the free speech rights of Catholics.

The Thomas More Law Center is a national, not-for-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.

The Catholic League and the Thomas More Law Center address in this brief only the second question under review: "Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,'

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[1] This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Catholic League and the Thomas More Law Center, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Catholic League and the Thomas More Law Center have no parent corporations and no stock. Sup. Ct. R. 29.6.

violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment."

The Catholic League and the Thomas More Law Center have an interest in preserving the right of Americans to publicly acknowledge God and our God-given freedom, which is done daily in this country through the willing recitation of the Pledge of Allegiance, including in the public schools.

The Catholic League and the Thomas More Law Center appear as amici curiae in support of Petitioners Elk Grove Unified School District and Superintendent David W. Gordon and urge this Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow II*").

## SUMMARY OF THE ARGUMENT

The phrase "under God" in the Pledge of Allegiance does not have the Constitutionally impermissible effect of establishing a religion. Rather, it acknowledges our nation's rich religious heritage, that is, the undeniably religious belief regarding God-given freedom, which informed the founding of our independent nation and the establishment of our limited form of government.

Moreover, the recitation of the Pledge with the phrase "under God," especially by our youngest citizens (including willing public school children) encourages continuing recognition of the idea of God-given freedom – the very principle that unites Americans as a people. This on-going acknowledgment of our unifying religious heritage serves



a beneficial secular purpose and is completely compatible with the Establishment Clause.

This Court should take this opportunity to affirm once and for all that a voluntary nonsectarian invocation of God in public, especially in the public schools, does not violate the Establishment Clause, and is in fact Constitutionally consistent with our nation's history and religious heritage.

## ARGUMENT

### A. The Attack on the Public Acknowledgement of Our Nation's Religious Heritage.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

As Judge O'Scannlain demonstrated in his dissent to the Ninth Circuit's denial of an en banc rehearing in *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow I*"), this Court has consistently held that "[f]ormal religious observances are prohibited in public schools because of the danger they may effect an establishment of religion." *Newdow v. United States Congress*, 328 F.3d 466, 477 (9th Cir. 2003) ("*Newdow II*") (O'Scannlain, J., dissenting) (citations omitted).

Yet, as Judge O'Scannlain went on to point out, this Court has just as consistently "gone out of its way to make it plain that [patriotic references to God, including] the Pledge itself passes constitutional muster." *Id.* at 479 (O'Scannlain, J., dissenting). Recitation of the Pledge of Allegiance is not a religious observance, which implicates the Establishment Clause; rather, it is a patriotic act that

acknowledges our nation's religious heritage. *See Lynch v. Donnelly*, 465 U.S. 668, 676-77 (1984) (stating that use of the phrase "one nation under God" is one way the government acknowledges the religious heritage of the United States).

In dissenting from the majority's holding in *Lee v. Weisman*, 505 U.S. 577, 638-39 (1992), Justice Scalia predicted that the Pledge of Allegiance would soon come under attack as violating the Establishment Clause because public school children who do not wish to recite it are required to be present when others do so. That attack is underway. Manifestly, the attack is not aimed at the Pledge alone, but at every public acknowledgement of our nation's religious heritage. As Judge O'Scannlain noted:

> If reciting the Pledge is truly a "religious act" in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem. Such an assertion would make hypocrites out of the Founders, and would have the effect of driving any and all references to our religious heritage out of our schools, and eventually out of our public life.

*Newdow II*, 328 F.3d at 473 (O'Scannlain, J., dissenting).

This Court should take advantage of the opportunity presented by this case to halt in its tracks the misguided movement to prevent all public acknowledgment of our rich religious heritage.



### B. Our Historic Religious Heritage of God-Given Freedom.

This nation and its form of government were founded upon an essential idea: individuals have God-given rights that the state can neither bestow nor deny.[2]

That idea is crystallized in the most famous passage of the Declaration of Independence – the document that marked us as a separate people: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776).

Unlike the citizens of most other nations, Americans are not a people because we simply share a common tract of land or a language or a bloodline. Rather, we are a people because we subscribe to a central, unifying idea, a principle, a creed – our God-given rights, including, most essentially, our liberty. Therefore, patriotic Americans have a dual loyalty: both to their country and to the ideas

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[2] Our Founders "believed that man was created in God's image and likeness, as stated in Genesis 1:26-27. This is extraordinarily significant. The concept that man was created in the image and likeness of God means that man has intrinsic worth and dignity. As such, man is endowed with inalienable rights that no other men can rightfully take away; he is entitled to freedom. So the Biblical affirmation of man's inherent worth is fundamental, indeed indispensable, to political liberty." David Limbaugh, *Persecution: How Liberals Are Waging War Against Christianity* 316 (2003). This concept was well known to our Founders through the works of John Locke, who wrote that all men are "equal and independent" because they are "all the workmanship of one omnipotent and infinitely wise maker. . . . " John Locke, *Two Treatises of Government*, Part II, Sec. 6 (1690).

it embodies. *See, e.g.*, John Parker, *A Nation Apart: A Survey of America*, The Economist, Nov. 8-14, 2003, at center section 14.

The idea of God-given freedom is our heritage, historic and yes, religious. Public recognition of that heritage should never be prevented. It should be reinforced among the citizenry at every opportunity.

The 1954 addition of the words "under God" to the Pledge of Allegiance was designed to aid in that patriotic purpose. As President Eisenhower said in a message recognizing the initiative of the Knights of Columbus in originating the addition of the phrase "under God" to the Pledge:

> These words will remind Americans that despite our great physical strength, we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded.[3]

Thus, recitation of the words "under God" in the Pledge of Allegiance serves to remind our citizens of their own gift of freedom, as well as the foundation of our nation and government in that God-given freedom.

The movement to drive away any and all public references to God and religion, and therefore our defining religious heritage, is both irrational and dangerous. It must be resolutely resisted.

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[3] *How the Words "Under God" Came to be Added to the Pledge of Allegiance to the Flag*, at http://www.kofc6793.org/underGod.html.



### C. The Irrationality of Eradicating the Public Acknowledgement of God and Religion.

The movement to halt the public acknowledgement of God is irrational because it attacks mere acknowledgements of our religious heritage, which plainly do not rise to the level of an establishment of religion.

The Establishment Clause must be interpreted "with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673. As the United States Court of Appeals for the Seventh Circuit observed in *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437, 445 (7th Cir. 1992) (citations omitted), *cert. denied*, 508 U.S. 950 (1993),

> You can't understand a phrase such as "Congress shall make no law respecting an establishment of religion" by syllogistic reasoning. Words take their meaning from social as well as textual contexts, which is why "a page of history is worth a volume of logic." Unless we are to treat the founders of the United States as unable to understand their handiwork (or worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as "establishment." They did not.

Our Founders believed in and acknowledged the impact of Divine Providence on men and nations. They relied on that belief in founding this nation and its form of government. Indisputably, as the following examples show, they frequently acknowledged that belief in the course of their civic life:

- In an address to the Continental Army in 1776, General Washington stated that "[t]he

fate of unborn millions will now depend, under God, on the courage of this army." 3 Jared Sparks, ed., *The Writings of George Washington* 449 (1837).

- Beginning in 1774, the Continental Congress adopted the procedure of opening its sessions with a prayer offered by a paid chaplain. *Marsh v. Chambers*, 463 U.S. 783, 787 (1983).
- In his preamble to Virginia's Act for Establishing Religious Freedom, Thomas Jefferson invoked the support of "Almighty God," "Lord both of body and mind." *Sherman*, 980 F.2d at 446 n.5.
- In 1798, John Adams said, "We have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other." 9 Charles F. Adams, ed., *The Works of John Adams, The Second President of the United States* 401 (1854).
- James Madison, author of the First Amendment, wrote in 1785 that "Religion [is] the basis and Foundation of Government." 8 Robert Rutland, ed., *The Papers of James Madison* 299, 304 (1973).

Moreover, the Founders' practice of public invocations of God and religion has continued throughout the 200-plus year history of our nation. As Chief Justice Burger stated in *Lynch*, 465 U.S. at 674-75:

> There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789. . . . Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.



Chief Justice Burger went on to list many examples of official references to Divine guidance, including National Days of Prayer, Presidential and Congressional proclamations of Christmas and Thanksgiving, paid National Holidays, compensation for military and Congressional Chaplains, the national motto "In God We Trust," and the Pledge of Allegiance. *Id.* at 676.

In his dissent to the majority's opinion in *Newdow II*, Judge Fernandez explains in powerful and practical terms why such nonsectarian invocations of God simply do not violate the Establishment Clause:

> [S]*uch phrases as "In God We Trust," or "under God" have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion*, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity. Those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.

*Newdow II*, 328 F.3d at 492 (Fernandez, J., dissenting) (emphasis added).

Judge Fernandez further observed:

> [These phrases] have not led us down the long path to kulturkampf or worse. Those who are somehow beset by residual doubts and fears should find comfort in the reflection that no baleful religious effects have been generated by the existence of similar references to a deity throughout

> our history. More specifically, it is difficult to detect any signs of incipient theocracy springing up since the Pledge was amended in 1954.

*Id.* at 492 n.4 (Fernandez, J., dissenting) (emphasis added).

To date, this Court has wisely recognized that public acknowledgements of our historic religious heritage, even in our public schools, do not violate the Establishment Clause. *See Lynch*, 465 U.S. at 676; *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

Certainly the Pledge has religious connotations as it acknowledges the existence of a Supreme Being through the phrase "under God." Yet, in light of the purpose of that phrase – that is, nurturing a remembrance of and respect for our heritage of God-given freedom – its reference to God also has an appropriate, patriotic purpose. The Pledge of Allegiance, with the inclusion of the words "under God," poses no danger of establishing a state religion. Therefore, the amici curiae respectfully urge this Court to reverse the judgment of the Ninth Circuit and establish once and for all that the Pledge, as currently codified, 4 U.S.C. § 4, does not violate the Establishment Clause.

### D. The Danger of Divorcing All Public Reference to God and Religion.

The movement to divorce all public reference to God, including our historic religious heritage, is dangerous because it has the effect of undermining our nation's unifying principle, our belief in our God-given freedom.

A failure to publicly acknowledge God and the role of religion in our nation completely ignores what the majority



of Americans have always believed. Almost 200 years ago, Alexis de Toqueville, that great observer of America and its people, commented in his two-part work, *Democracy in America*:

> Religion in America . . . must be regarded as the foremost of the political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of it. . . . I do not know whether all Americans have a sincere faith in their religion – for who can search the human heart? – But I am certain that they hold it to be indispensable to the maintenance of republican institutions.

1 Alexis de Toqueville, *Democracy in America* 316 (1955).

That belief in the indispensability of faith and God to the success of our form of government continues to this day. Over eighty percent of Americans say they believe in God. *See* John Parker, *A Nation Apart: A Survey of America*, The Economist, Nov. 8-14, 2003, at center section 12. And, as demonstrated by the very furor with which the public received the Ninth Circuit's attempt to remove the phrase "under God" from the Pledge of Allegiance, Americans still want to publicly acknowledge God's influence on our nation. *Newdow II*, 328 F.3d at 471-72 (O'Scannlain, J., dissenting).

In fact, this Court has recognized the religious nature of the American citizenry and the impact of their beliefs on their government: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Failing to continue that recognition and respect for the impact of religious belief on our government will have

consequences far beyond simple neutrality (or even hostility) toward religion. Rather, it will effectively impose an official atheism on an essentially religious people.

As Judge O'Scannlain pointedly explained in his dissent, interpreting acknowledgements of our historic religious heritage as violations of the Establishment Clause pushes our government, if not our people, further down the road to adoption of atheism as our state religion:

> The decision reached in *Newdow II* . . . adopts a stilted indifference to our past and present realities as a predominantly religious people. But *Newdow II* goes further, and confers a favored status on atheism in our public life. In a society with a pervasive public sector, our public schools are a most important means for transmitting ideas and values to future generations. The silence the majority commands is not neutral – it itself conveys a powerful message, and creates a distorted impression about the place of religion in our national life. *The absolute prohibition on any mention of God in our schools creates a bias against religion. The panel majority cannot credibly advance the notion that Newdow II is neutral with respect to belief versus non-belief; it affirmatively favors the latter to the former. One wonders, then, does atheism become the default religion protected by the Establishment Clause?*

*Newdow II*, 328 F.3d at 481-82 (O'Scannlain, J., dissenting) (emphasis added).

Is it a coincidence that the societies that have officially eschewed God and embraced atheism (for example, the Soviet Union and its Eastern European satellite nations, the People's Republic of China, North Korea, and Cuba) have been among the most totalitarian and oppressive in



the modern history of the world? We think not. Absent the protective effect of a belief in God-given freedom that is above and beyond governments, the dictators of these nations were able to rob their people of their liberty.

Our inspired Founding Fathers were brilliant but humble men. They knew that our fledgling nation could not hope to defeat the most powerful nation on Earth without God's guidance and protection. Their synergistic religious belief and patriotic fervor gave birth to a great new nation. In the more than two centuries that followed, the "unborn millions" of whom George Washington spoke have since lived as free men and women – in glorious testament to the wisdom and righteousness of the ideal of "one nation under God." And, yet, now that these United States have emerged in the Twenty-First Century as the single most powerful nation on Earth, have we outgrown the ideals of our forefathers? Are we now so much wiser and braver than our countrymen who came before us? Can our nation still stand tall, or at all, if we remove the solid religious foundation on which it was built? The answer to these questions is no.[4]

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[4] Since the attacks of September 11, 2001, our nation has been at war. Our enemies are threatening our freedom at home with the tactics and weapons of terrorism. Our military men and women are defending our liberties in hostile lands, and will be called upon to do so for the foreseeable future. The Pledge of Allegiance in its present form is an inspiration to those soldiers, sailors, and Marines. *See, e.g.*, Jessica Lynch, *Being an American*, Parade, November 9, 2003, at 6-8. Will those troops be more inspired, and feel more confident, if they suddenly find themselves fighting for a nation that no longer acknowledges that it is under God? In these dangerous times, we must seriously consider whether we have really outgrown our need to acknowledge God and the influence of Divine Providence over the affairs of our nation.

We must not forget who we are as a people. We are united by our belief in the principle of God-given liberty and the manifestation of that principle in our form of government. We allow that truth to be expunged from public life at our peril.

As Thomas Jefferson said in 1781, "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII (1781).[5] Undoubtedly, if we are to maintain our freedom and our unity, the conviction to which Thomas Jefferson referred must be continually re-asserted and re-affirmed in the minds of the

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[5] Thomas Jefferson's quote further states, "That [these liberties] are not to be violated but with His wrath? Indeed I tremble for my country when I reflect that God is just; that His justice cannot sleep forever." Thomas Jefferson, *Notes on the State of Virginia*, Query XVIII (1781). Jefferson penned those words in fearful anticipation of God's judgment on America's practice of slavery. Interestingly, during the Civil War that ultimately ended that shameful blight on our history of liberty, in his *Gettysburg Address*, President Lincoln reinvoked our God-given freedom, using the very phrase the Ninth Circuit finds offensive to the Constitution:

> It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion – that *we here highly resolve that these dead shall not have died in vain – that this nation, under God, shall have a new birth of freedom – and that government of the people, by the people, for the people, shall not perish from the earth.*

Abraham Lincoln, *Gettysburg Address*, at http://www.thecapitol.net/Recommended/Lincoln.htm (emphasis added).



American citizenry. The Pledge of Allegiance is one method by which we accomplish this noble purpose.

### E. The Pledge of Allegiance Does Not Coerce Religious Belief or Practice.

Finally, it is critical to remember that no one is forced to recite the Pledge of Allegiance, notwithstanding the fact that the vast majority of Americans are happy to recite it. Anyone, including the public school student, is free to decline to recite the Pledge for any reason. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Lee*, 505 U.S. at 638-39 (Scalia, J., dissenting) (noting that being required to sit, or even stand, in respectful silence does not necessarily convey participation in a religious or a patriotic exercise).

Moreover, as the Seventh Circuit explained, "So long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag 'and to the Republic for which it stands.'" *Sherman*, 980 F.2d at 445.

The fact that some citizens are "uncomfortable" hearing others recite the Pledge of Allegiance simply is not enough to make it a constitutional violation. As Judge Fernandez correctly pointed out in his dissent to the majority's opinion in *Newdow II*:

> I recognize that some people may not feel good about hearing the phrases recited in their presence, but, then, others might not feel good if they are omitted. At any rate, the Constitution is . . . not primarily a feel-good prescription. In *West*

> *Virginia Board of Education v. Barnette*, . . . the Supreme Court did not say that the Pledge could not be recited in the presence of Jehovah's Witness children; it merely said that they did not have to recite it. That fully protected their constitutional rights by precluding the government from trenching upon "the sphere of intellect and spirit." As the Court pointed out, their religiously based refusal "to participate in the ceremony [would] not interfere with or deny rights of others to do so." We should not permit Newdow's feel-good concept to change that balance.

*Newdow II*, 328 F.3d at 492 (Fernandez, J., dissenting) (citations omitted).

The truth of our God-given freedom continues to be self-evident. Let us not separate ourselves from the principle that unites us as a people. Accordingly, the words "under God" must remain in our Pledge of Allegiance and continue to be said each day by Americans, including willing students in the public schools.



## CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit for the reasons stated above and in Petitioners' brief.

Respectfully submitted,

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